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IN THE

Supreme Court of the United States

October Term, 1973

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 29 U.S.C, Sec. 151, *et seq.*):

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, National Maritime Union of America, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, filed November 12, 1973, enforcing an order of the National Labor Relations Board dated May 16, 1972, as corrected by orders dated May 22, 1972 and August 31, 1972, in the case docketed before the National Labor Relations Board as No. 2-CE-44.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated October 10, 1973, is reported at 486 F.2d 907, and is printed in the Appendix hereto (3a). The Decision and Order of the National Labor Relations Board, including the opinion of Trial Examiner Thomas A. Ricci, dated May 16, 1972 is reported at 196 NLRB No. 166, and is printed in the Appendix hereto (16a). Orders of the National Labor Relations Board dated May 22, 1972 and August 31, 1972, correcting the Order of May 16, 1972 are printed in the Appendix hereto (46a, 48a). Prior related proceedings are reported as follows: Opinion of the United States District Court for the Southern District of New York reported at 329 F. Supp. 151 (S.D.N.Y. 1971). Opinion of the United States Court of Appeals for the Second Circuit reported at 457 F.2d 1127.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 12, 1972 and is printed in the Appendix hereto (1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Where a provision in a union's collective bargaining agreement sought to preserve the jobs and job opportunities of all employees in the union's bargaining unit, was it not error for the National Labor Relations Board and the court below to hold that Section 8(e) of the National Labor Relations Act restricted the union's right to seek job preservation to a unit of employees that was smaller than the union's actual bargaining unit?

2. Where a union has negotiated an industry-wide contract, with an industry-wide pension plan and hiring on an industry-wide basis through common hiring halls, may not the union seek to preserve the stability of its pension plan and the job opportunities of the employees it represents by obtaining an agreement from the employers with whom it has contracted that, during the term of the contract, the employers will not transfer jobs outside the industry-wide group that signed the contract?

3. Is a provision in a collective bargaining agreement which seeks to prevent the transfer of jobs outside the bargaining unit represented by the union prohibited by Section 8(e) of the National Labor Relations Act.

Statutory Provision Involved

Section 8(e) of the National Labor Relations Act, as amended, 73 Stat. 544, 29 U.S.C.A. § 158(e):

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,*

That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or any industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Statement of the Case

In June of 1969, the National Maritime Union of America, AFL-CIO (hereafter "NMU"), petitioner herein, extended its collective bargaining agreements with various operators of deep sea ocean going vessels. The new contract was for a period of three years and represented the product of extensive negotiations designed to bring to the NMU segment of the maritime industry a substantial degree of stability in employment, and most important, stability to the NMU Pension Plan which would suffer impairment if employment by the contract employers were to substantially decline. The latter possibility was of great concern to the NMU in the 1969 negotiations because contributions to the pension plan were geared to the level of employment by the employers signing the contract. To meet this possibility of a detrimental effect on the pension plan should there be a decline in employment by the NMU contract employers the NMU was successful in negotiating a provision, which subsequently became Article 1, Section 2 of the 1969 contract, that if, during the life of the contract, an NMU contract employer sought to transfer a vessel to an employer who was not subject to the NMU contract, and therefore not making contributions to the NMU Pension Plan, a condition of the transfer would be that the transferee employer would recognize the NMU contract as remaining applicable to the particular vessel involved,[1] continue hiring crew members for the vessel from the same pool of employees as the transferring em-

[1] Article 1, Section 2 provided:

"Sale and Transfer of Vessels. (a) The company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a

ployer,[2] and continue making contributions for those employees to the NMU Pension Plan. In this manner the level of employment for NMU seamen and the level of contributions to the NMU Pension Plan would remain relatively constant for the life of the contract. It is the NMU's efforts to enforce this contract provision that has led to the instant litigation.

One of the employers who signed the 1969 NMU collective bargaining agreement was Commerce Tankers Corporation (hereafter "Commerce"). At the time Commerce was operating two ocean going tankers, the S.S. "Barbara" and the S.S. "Thalia". Early in 1970 Commerce sold the S.S. "Thalia" to another NMU contract company and,

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vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.

"(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement."

[2] In the maritime industry virtually all hiring is through union operated hiring halls. The NMU collective bargaining agreement contains provisions for a hiring hall under which the employers agree to hire all their unlicensed seamen through the NMU hiring halls. The collective bargaining agreement also contains provisions establishing the seniority bases on which employees are eligible for employment, including whether they are entitled to permanent, as distinguished from relief, jobs.

since the NMU contract remained applicable to the vessel, no difficulty ensued. However, in December of 1970, Commerce entered into a contract with Vantage Steamship Corporation (hereafter "Vantage"), the charging party and one of the intervenors in the court below, under which it agreed to sell the S.S. "Barbara" to Vantage. NMU was not notified in advance by Commerce of this agreement with Vantage, and the contract did not contain any provision requiring Vantage to comply with the NMU collective bargaining agreement.

Early in January of 1971 NMU learned of the contemplated sale of the "Barbara" to Vantage. By letter dated January 11, 1971, NMU wrote to Commerce reminding it of its obligations under Article 1, Section 2 of the collective bargaining agreement. Commerce replied by letter dated January 13, 1971, confirming the existence of the agreement with Vantage, and stating that it was aware of its contractual obligations and that there was "no reason to believe" that they would not be fulfilled.

As it turned out, there was considerable reason for believing that these contractual obligations would not be fulfilled. When NMU attempted to contact Vantage, it was advised that Vantage would not recognize the NMU contract. It became apparent to NMU that Commerce intended to transfer the vessel to Vantage without complying with Article 1, Section 2, and was making contrary representations to NMU in order to mislead NMU into inaction. Accordingly, in order to protect itself, NMU instituted an arbitration proceeding against Commerce under the contract grievance procedure and obtained an order from the arbitrator enjoining Commerce from transferring the S.S. "Barbara" without complying with Article 1, Section 2 of its collective bargaining agreement with NMU.

NMU then brought suit in the District Court to enforce the arbitrator's award, and a preliminary injunction

was entered enjoining Commerce from transferring the "Barbara" without complying with Article 1, Section 2 of the collective bargaining agreement.[3] Vantage then filed unfair labor practice charges with the Regional Director for the National Labor Relations Board, contending, *inter alia*, that the maintaining and enforcing of Article 1, Section 2 of the collective bargaining agreement between NMU and Commerce was in violation of Section 8(e) of the National Labor Relations Act.[4] It is this charge that led to the instant proceeding.

Decisions Below

The Vantage unfair labor practice charge was tried before Trial Examiner Thomas A. Ricci who, on September 2, 1971, filed a decision in which he found that Article 1, Section 2 of the NMU collective bargaining agreement was a valid work preservation provision and recommended dismissal of the charge (25a). The National Labor Relations Board reversed, holding that Article 1, Section 2 was in violation of Section 8(e) of the National Labor Relations Act, as amended (16a).

As viewed by the Board and conceded by all parties, the basic question in determining if there had been a violation of Section 8(e) was whether the Union's objective was preservation of work for *unit* employees, or was to satisfy union objectives elsewhere. The answer to this question, in turn, depended upon the determination of

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[3] *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971), *reversed*, 457 F.2d 1127 (2nd Cir. 1972).

[4] The Regional Director for the Second Region petitioned the District Court for an injunction under Section 10(1) of the Act, 29 U.S.C., Section 160(1). This petition was denied, *McLeod* v. *National Maritime Union*, 329 F. Supp. 151 (S.D.N.Y. 1971), but this denial subsequently was reversed, 457 F.2d 1127 (2nd Cir. 1972).

what was the appropriate unit of employees for which the Union may seek to preserve job opportunities.

NMU contended that the appropriate unit consisted of those employees seeking employment through the NMU hiring halls and who might be referred for employment aboard the S.S. "Barbara". The Board did not reject this contention; instead it declined to decide this crucial issue by stating that it would "assume without deciding" that the unit could include such employees. Said the Board:

> "And we can *assume without deciding* that this single-employer unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce." (Emphasis supplied) (20a).

However, after "assuming without deciding" that the unit represented by the NMU could be deemed to include those employees entitled to seek employment through the NMU hiring halls, the Board proceeded to ignore the necessary consequence of this assumption and held that the Union could seek job preservation *only* for those employees actually employed aboard a ship at the time of sale. Thus, the Board performed the unique feat of finding that the whole was *less* than the sum of its parts, for while it held that the unit represented by the Union could consist of all employees entitled to seek employment through the hiring halls, it held that the Union could not seek job preservation for this unit, but, instead, job preservation was restricted to a much smaller group defined as those actually employed aboard a ship at the time of sale.

The Court of Appeals for the Second Circuit granted enforcement of the Board's Order (3a). In so doing, the Court held that the Union's bargaining unit was not the yardstick for measuring the permissible scope of a work preservation clause when that unit was "many

times larger than the actual work force of the primary employer" (15a).

In deciding the case on this basis both the Board and the court below have substantially departed from numerous prior decisions of the Board itself and various Courts of Appeals which have held that the bargaining unit represented by the union was the yardstick for measuring the permissible scope of a work preservation provision. Moreover, the decisions below ignore the significance of the fact that bargaining in the maritime industry is on an industry-wide basis (although it may not meet the technical requirements of multi-employer bargaining) and that the number of employees in the bargaining unit is not many times larger than the combined actual work force of all the employers who hire through the same hiring hall and contribute to the same pension plan. Because virtually all hiring in the maritime industry is through hiring halls, the net effect of the decisions below is to deny unions in the maritime industry any meaningful means for job preservation and for protecting the stability of their pension plans.

Reasons Relied on for Allowance of the Writ

I. The Decision Below Violates The Principle Established By This Court In *National Woodwork Manufacturers Assoc.* v. *NLRB*, 386 U.S. 612 (1967), That A Union May Seek To Protect The Jobs And Job Opportunities Of All Employees In Its Bargaining Unit, And Is Contrary To Numerous Prior Decisions of Various Courts of Appeal And The Board Recognizing A Union's Bargaining Unit As Defining The Scope Of A Permissible Job Preservation Provision.

The only prior decision in which this Court has had occasion to consider the scope and application of Section 8(e) of the Act to work preservation provisions in collective bargaining agreements is *National Woodwork Manufacturers Assoc.* v. *NLRB*, 386 U.S. 612 (1967). In *National Woodworking*, this Court disapproved of the practice on the part of the National Labor Relations Board of giving an expansive interpretation to Section 8(e) of the Act and applying it to situations which Congress did not intend it to cover. The decision in *National Woodworking* called a halt to this expansive application of Section 8(e) by holding that Section 8(e) was enacted solely for the purpose of closing the loop hole in the secondary boycott provisions of the Taft-Hartley Act resulting from the *Sand Door* decision, *United Brotherhood of Carpenters, etc.* v. *NLRB*, 357 U.S. 93 (1958)[5] Relying heavily on Section 8(e)'s legislative history, this Court concluded that Section 8(e) should not be interpreted as being applicable to anything more than the particular situation it was designed to correct, namely, closing the *Sand Door* loophole in the Act. Thus, this Court concluded, 386 U.S. at 635:

> "This loophole-closing measure likewise did not expand the type of conduct which § 8(b) (4) (A)

[5] The *Sand Door* case had held that the secondary boycott provisions adopted as part of the Taft-Hartley Act applied only to coercive conduct by a union and did not preclude a voluntary agreement between a union and an employer not to handle the goods of a neutral employer.

> condemned. Although the language of § 8(e) is sweeping, it closely tracks that of § 8(b) (4) (A), and just as the latter and its successor § 8(b) (4) (B) *did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, § 8(e) does not prohibit agreements made and maintained for that purpose.*" (Emphasis supplied)

Bearing in mind the limited scope of Section 8(e), this Court set the tone for its application as requiring an inquiry into whether the union's objective was the preservation of work for the employees it represented, or "to satisfy union objectives elsewhere", 386 U.S. at 644. "The touchstone is whether the agreement or its maintenance is addressed to labor relations of the contracting employer *vis-a-vis* his own employees." 386 U.S. at 645.

In several cases following *National Woodwork,* the Board and the Courts of Appeal drew a distinction between contract provisions designd to protect unit employees (such provisions dealt with the "labor relations of the contract employer *vis-a-vis* his own employees"), and contract provisions designed to acquire control for the union over jobs and employees it did not represent (agreements calculated to satisfy union objectives "elsewhere"). The threshold test which was developed was whether the provision in question was designed to protect the jobs of "unit" employees, see *International Union United Mine Workers, etc. (Bituminous Coal Operators)* 165 NLRB 467 (1967); *Meat and Highway Drivers, Etc.* v. *NLRB,* 335 F.2d 709 (D.C. Cir. 1964); *Orange Belt District Council* v. *NLRB,* 328 F.2d 534 (D.C. Cir. 1964), it being recognized that Section 8(e) did not condemn as being "secondary" efforts by unions to protect the jobs of those employees in the unit for which it had both the statutory right and duty to bargain.

While other tests were developed, such as whether a contract was a "signatory" contract, or a "union membership" contract, or a "union standards" contract, see *e.g., Local Union No. 636, Etc.* v. *NLRB,* 430 F.2d 906 (D.C. Cir. 1970); *American Boiler Mfgrs. Assoc.* v. *NLRB,* 404 F.2d 556 (8th Cir. 1968); *A. Duie Pyle, Inc.* v. *NLRB,* 383 F.2d 772 (3rd Cir. 1967), *NLRB* v. *Local Union No. 28 Sheet Metal Workers,* 380 F.2d 828 (2nd Cir. 1967); *Kennedy* v. *Sheet Metal Workers Local 108,* 289 F. Supp. 65 (C.D. Calif. 1968); *Kaynard* v. *Local 282, Teamsters Union,* 275 F. Supp. 19 (E.D.N.Y. 1967); *Retail Clerks, Local 1288,* 163 NLRB 817 (1968), these cases did not reject the fundamental principle that the right to job preservation extended to *all* unit employees; rather these other tests were designed as a means for distinguishing between contract provisions which were limited to protecting unit employees, and contract provisions which were designed to extend union control over non-unit employees.

Before the Board and the court below, NMU contended that the bargaining unit it represented consisted of all employees eligible to seek employment through the NMU hiring halls. Since all such employes were eligible to seek employment aboard the vessels operated by Commerce, the Commerce bargaining unit was co-extensive with the industry-wide unit. Neither the Board nor the court below rejected NMU's definition of the bargaining unit.[6] Instead, contrary to all prior decisions, they held that the right to

[6] Although the Board equivocated by stating that it would "assume without deciding" that the Commerce single-employer unit included employees in the hiring hall who might be referred for employment in the future, there really can be no doubt that the Commerce single-employer unit included those eligible to seek employment on Commerce vessels as well as those actually employed aboard ship. This readily becomes apparent from the nature and history of the bargaining relationship involved. Here the important feature is the hiring hall as it operates in the maritime industry. The hiring hall is provided for in the collective bargaining agreement between the union and the employers, which in this case, included

contract for job preservation was limited to a group that was much smaller than the bargaining unit, namely the men actually employed aboard a vessel at the time of sale.

The Board, without citing any supporting authority whatsoever, held that the only unit for which the union could seek job preservation was a unit consisting of those employees who had permanent jobs aboard the ship at the time it was sold, thereby necessarily also holding that the union had no right to seek job preservation for the remaining employees in the unit, namely those eligible to seek

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Commerce. In the contract the employer (Commerce) agrees to procure all its unlicensed personnel through the contract hiring hall. The contract also establishes seniority classifications, bases for rejecting applicants, and similar matters defining the relationship between the employer (Commerce) and the seaman *long before he even applies for employment,* let alone actually is engaged aboard a vessel. Thus in the maritime industry, where virtually all hiring is accomplished through hiring halls, *the unit of employees for which the employer and the union in fact bargain consists of those employees entitled to seek employment through the hiring hall.*

In addition to this being the unit for which the union and the employer do in fact bargain, it is also clear that the union and the employer *have a legal duty* to bargain for this unit. As an example, it requires no citation of authority to recognize that if an applicant for employment through a hiring hall were rejected for employment by an employer in violation of the hiring hall regulations, the union would be under an obligation to handle the employee's grievance. Any argument that the union had no obligation to represent the applicant because he was not an employee of the company at the time and, therefore, not in the bargaining unit, would be quickly rejected, *Local 872 International Longshoremen's Association,* 163 NLRB 586 (1967); *Local 1351, Steamship Clerks, etc., vs. NLRB,* 329 F.2d 259 (D.C. Cir. 1964), *cert. denied,* 377 U.S. 993.

It follows that a collective bargaining agreement which provides for a hiring hall creates a relationship between the employer, the union, and the individuals who seek employment through the hiring hall, which *pre-dates* and is not dependent upon the actual existence of the employer-employee relationship. ***In signing a collective bargaining agreement which provides for recognition of a hiring hall, an employer assumes a contractual obligation to all those entitled to use the hiring hall which brings these individuals within the unit of employees with whom the employer has agreed to bargain.***

employment through the hiring hall. This distinction between permanent and non-permanent employees misses the basic purpose of job preservation clauses, and, if recognized, would invalidate virtually all work preservation provisions. A valid work preservation provision may, and usually does, preserve job opportunities for individuals represented by a union even though they may not actually be employed by the employer at a particular time, and this fact never has been thought to have any bearing on the validity of a work preservation provision. This point can be easily demonstrated.

It is true, of course, that Article 1, Section 2 of the NMU collective bargaining agreement protects the job opportunities of all seamen seeking employment through the NMU hiring halls *vis-a-vis* all the employers under contract to NMU and not just as against Commerce. This is because the hiring hall creates a common pool of employees serving all the contract employers, and the same contractual relationship which exists between a seaman seeking employment through the hiring hall and Commerce also exists between the seaman and all the other contract employers. The fact that this pool of employees available to Commerce is co-extensive with the pool of employees available to the other employers does not make it illegal for the union to seek job preservation for this pool of employees *vis-a-vis* Commerce, or any other individual employer. In *American Federation of Television and Radio Artists (Westinghouse Broadcasting Co., Inc.)*, 160 NLRB No. 24 (1966), the similar argument was made that a work standards provision was illegal because it protected the employees of other employers who have the same work standards. The Board rejected the argument that such an effect, *even if intended,* made the work standards provision illegal, stating:

> ". . . The fact that the Respondent's representative admitted that the Union also desired to protect the wage standards of union members not working for WINS does not, by itself, affect the lawfulness of such conduct. *This is true because whenever a union also represents other units of employees doing the same type of work, its conduct aimed at setting the wage rates and protecting the work of unit employees will necessarily have the additional and incidental effect of protecting the wage standards of such other employees. To find that because of this additional object the Union's conduct is secondary would mean that in most cases it would not be permissible for a union to take action to obtain a 'work-standards' clause.*" (Emphasis supplied)

It is well settled that a contract provision which prohibits an employer from subcontracting out work is a valid work preservation provision, *e.g., Meat and Highway Drivers, etc.* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964). Such a provision protects the job opportunities not only of the employees who are working for the employer at a particular time but also protects, *by preserving jobs within the bargaining unit*, those employees who may be hired after them during the term of the contract. Moreover, a company may have men in lay-off status who have seniority with the company and a contract right to be recalled when work becomes available. To the extent that the "no subcontracting" clause retains work within the company which might otherwise be done elsewhere, it enhances the job opportunities of these men in lay-off status. Since the men in lay-off status are not actually employed at the time the contract is signed, they, like the men in the NMU hiring halls waiting for employment, are not permanent employees of the employer, although one can be sure that a large number of employees in lay-off status would be the motivating reason for a union to seek a "no subcontracting" provision in its collective bargaining agreement.[7] These men awaiting employment may not be permanent employees because not actually employed, but economically they are the employees most directly affected by a work preservation provision, and being a part of the Union's bargaining unit, it is the preservation of their job opportunities which makes the union's effort to protect them "primary", as distinguished from "secondary" activity.

The statement by the court below that the bargaining unit is not the yardstick for permissible job preservation when it is many times larger than the actual work force of the primary employer overlooks the fact that this will

[7] Work recapture is clearly the type of primary activity which is not prohibited by Section 8(e), see *Meat and Highway Drivers, etc.* v. *NLRB*, 335 F.2d 709, at 714 (D.C. Cir. 1964).

always be the case where an employer is only one of many employers bargaining on an industry-wide basis and hiring is through a common hiring hall. In such circumstances, the bargaining unit always is larger than the actual work force of any individual employer, but is not larger than the combined work force of all the employers who signed the industry-wide contract. Carried to its logical conclusion, the rationale of the court below would result in invalidating all work preservation clauses in hiring hall industries. More important, as this Court recognized in *National Woodwork*, *supra*, Section 8(e) does not reach union activity designed to preserve work traditionally done by the employees represented by the union. The relative size of the bargaining unit and the number of actual employees has no bearing on basic issue of whether the union is seeking to preserve for its bargaining unit work traditionally done by members of the bargaining unit. It follows that any retreat from the principle that the right to seek job preservation extends to all employees in the bargaining unit would deprive employees of their right, recognized in *National Woodwork*, to seek to preserve for themselves work traditionally done by them.[8]

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[8] The court below also based its decision in part on an alleged anti-SIU motivation on the part of NMU. The Board, however, made no such finding and did not base its decision on such alleged inter-union rivalry. Since the alleged anti-SIU motivation was not the basis of the Board's decision, it was error for the court below to base enforcement of the Board's order on a ground which was not considered by the Board. Moreover, throughout this litigation NMU has denied such anti-SIU motivation in connection with the negotiation of Article 1, Section 2 of the contract, and when this argument was litigated in the District Court on the Regional Director's application for a Section 10(1) injunction, the District Court specifically found that the motivation for the negotiation of Article 1, Section 2 was the NMU's desire to protect its pension plan, and not any anti-SIU motivation, see *McLeod* v. *National Maritime Union*, 359 F. Supp. 151, 157-158 (S.D.N.Y. 1971).

Since the decisions below reject the principle that work preservation clauses may extend to all employees in the bargaining unit, certiorari should be granted so that this error may be corrected and the decisions below reversed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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Intervenors.

APPENDIX

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(APPENDIX)

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 72-2268

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

—o—

Before:

LUMBARD, FRIENDLY and FEINBERG, *Circuit Judges.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, National Maritime Union of America, AFL-CIO, its officers, agents, and representatives, on May 16, 1972, as corrected by orders on May 22, 1972, and August 31, 1972. The Court heard argument of respective counsel on September 11, 1973, and has considered the briefs and transcript of record

filed in this cause. On October 10, 1973, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order, as corrected, of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, National Maritime Union of America, AFL-CIO, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Respondent.

/s/ HENRY J. FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

/s/ WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: November 12, 1973

A true copy,

A. DANIEL FUSARO,
Clerk

Opinion of Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—September Term, 1973.

(Argued September 11, 1973 Decided October 10, 1973.)

Docket No. 72-2268

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

VANTAGE STEAMSHIP CORPORATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Intervenors,

against

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

Before:

LUMBARD, FRIENDLY and FEINBERG, *Circuit Judges.*

On petition by National Labor Relations Board to enforce order requiring union to cease and desist from seeking to induce company to comply with agreement violating section 8(e) of the National Labor Relations Act.

Petition for enforcement granted.

Opinion of Court Below

FEINBERG, *Circuit Judge:*

For the fourth time in less than two years, the bitter rivalry between two maritime unions gives rise to knotty legal problems in this court. See also McLeod v. National Maritime Union, 457 F.2d 490 (2d Cir. 1972); National Maritime Union v. Commerce Tankers Corp., 457 F.2d 1127 (2d Cir. 1972); NLRB v. National Maritime Union, No. 72-2349 (2d Cir. June 18, 1973), enforcing in open court, National Maritime Union, 198 N.L.R.B. No. 112 (1972). On this occasion, the National Labor Relations Board seeks enforcement of its order holding that the National Maritime Union of America, AFL-CIO (NMU) and Commerce Tankers Corporation violated section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), by enforcing a provision in their collective bargaining agreement so as to prevent Commerce from selling one of its vessels to Vantage Steamship Corporation. Commerce Tankers Corp., 196 N.L.R.B. No. 165 (1972). Vantage was and is party to a labor agreement with the Seafarers International Union of North America (SIU). Both Vantage and the SIU, the latter joined by an affiliate, have intervened in this proceeding in support of the Board. For reasons set forth below, we enforce the Board's order.

I

The clause at issue is Article I, section 2 of the 1969 contract between Commerce and the NMU. This section, which is reproduced in the margin,[1] provides in substance

[1] Article I, section 2, which is entitled "Sale and Transfer of Vessels," provides:

(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not

that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser an undertaking to abide by the NMU contract. At the time of the agreement, Commerce owned two ships and in December 1970 sold one of them, the S.S. Thalia. Since the purchaser was a signatory to the standard NMU contract, no problem of inter-union rivalry arose.

However, later in the same month, Commerce agreed to sell its remaining vessel, the S.S. Barbara, to Vantage, which, together with its subsidiaries, operated a number of vessels whose employees were represented by the SIU. Very soon thereafter, both Commerce and Vantage found themselves caught between the competing demands of the two unions and frantic activity ensued in a variety of forums. Under pressure from the NMU, Commerce asked

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covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

Vantage to give the undertaking required by Article I, section 2. The SIU threatened to strike all the vessels operated by Vantage if it stopped using the SIU hiring hall as the exclusive source of its unlicensed seamen.[2] Vantage understandably refused to accede to the NMU-inspired demand, and threatened to sue Commerce if it did not sell the S.S. Barbara, as it has agreed to do. Similarly, the NMU refused to waive its contractual rights and promptly secured an arbitration award restraining Commerce from delivering the Barbara to Vantage without complying with the ship transfer provisions of the NMU contract. A month later, this award was confirmed and a preliminary injunction in favor of the NMU was issued by the United States District Court for the Southern District of New York. 325 F.Supp. 360.[3] In the interim, Vantage filed a charge with the National Labor Relations Board alleging that both the NMU and Commerce were violating section 8(e) of the Act. In May 1971, also in the Southern District, the Board's Regional Director sought an injunction under section 10(*l*) of the Act, 29 U.S.C. § 160(*l*), on the ground that he had reasonable cause to believe that the NMU and Commerce were violating section 8(e) of the Act. The injunction was denied. 329 F.Supp. 151. Appeals were taken both from this order and from the earlier Southern District order enjoining the sale of the vessel. The appeals were

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[2] Under the NMU contract, of course, Vantage would have to use the NMU hiring hall.

[3] Subsequently, Commerce commenced an arbitration against Vantage to enforce the contract of sale and, in addition, to require compliance with the NMU clause on the basis of an oral promise allegedly made by Vantage. The arbitrators 2-1 found for Commerce. On December 5, 1972, the award was enforced by Judge Gellinoff of the New York Supreme Court in an unreported opinion, and the Appellate Division 3-2 affirmed on the basis of that opinion. Vantage S.S. Corp. v. Commerce Tankers Corp., 41 A.D.2d 813, 342 N.Y.S.2d 281 (1973).

consolidated, and in March 1972 this court reversed both orders. 457 F.2d 1127. Even before issuance of the 10(*l*) injunction, however, the Board proceedings went forward. In September 1971, the Trial Examiner found that the contract clause did not violate section 8(e) because it "is purely a work preservation clause." In May 1972, the full Board unanimously concluded to the contrary,[4] and this petition for enforcement of its order followed.

II

Now that the dust has settled somewhat,[5] the precise legal question before us is simple to state but difficult to decide: Did the NMU violate section 8(e) of the Act by maintaining and enforcing Article I, section 2 (see note 1 supra) of the NMU-Commerce collective bargaining agreement? Section 8(e) makes it an unfair labor practice for a union and an employer

> to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person . . . .

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[4] The Board's decision and order was subsequently amended in May and in August 1972, without changing the result.

[5] Whether the dust has similarly settled on the S.S. Barbara, we do not know. On the prior appeal to this court, Judge Waterman plaintively observed that the legal activity of the parties

> is in marked contrast to the inactivity of the subject of the contract, the tanker *Barbara*, which sits idly in a shipyard in Mobile for the lack of unlicensed seamen to man her.

457 F.2d at 1130.

Opinion of Court Below

Before examining the judicial gloss on section 8(e) most pertinent here, we must note a preliminary problem. In finding a violation of the section in this case, the Board relied on the portion that makes it an unfair labor practice for a union (NMU) and an employer (Commerce) to agree to "cease doing business with any other person" (Vantage). It may at least be doubted whether an isolated sale of a capital item such as a ship comes within this language. It is arguable that such a transaction does not fit either the letter of the statute or the probable congressional purpose. However, although the Board faced the issue squarely and held that sales of ships occurred "in the normal course of doing business in the maritime industry," NMU counsel, at oral argument, expressly disclaimed reliance upon this point. Accordingly, we will assume—without deciding for the future—that in the ship-sale transaction, Commerce and Vantage were "doing business" with each other and that the disruption of the transaction was a cessation of this.

Section 8(e) was enacted in 1959 as part of the Landrum-Griffin amendments to the National Labor Relations Act, which were designed to correct what many employers and members of Congress thought were statutory deficiencies in dealing with secondary boycotts.[6] In Carpenters Local 1976 v. NLRB, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed. 2d 1186 (1958) (Sand Door), the Supreme Court had held that an employer's voluntary observance of a clause in his agreement with his employees not to handle nonunion goods was lawful under what was then section 8(b)(4)(A) of the

[6] The statute does not use the phrase "secondary boycott," and many secondary pressures are completely legal, as will be seen below. For a comprehensive, yet surprisingly compact, history of the law regarding secondary activity, see The Developing Labor Law 604-90 (1971) (Supplements 1971 and 1972), a project of the Section of Labor Relations Law of the American Bar Association.

Labor Act. 357 U.S. at 98-99, 78 S.Ct. 1011. Section 8(e) was designed "to plug this gap in the legislation by making the . . . clause itself unlawful." National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 634, 87 S.Ct. 1250, 1263, 18 L.Ed.2d 357 (1967). But section 8(e) like other sections designed to curb secondary activity, does not shimmer with clarity, and it has been a source of much litigation. See The Developing Labor Law, note 6 supra, at 645-74.

The Board held in this case that because Article I, section 2 of the contract prevented Commerce from selling a ship to Vantage, the clause was prohibited as one

> whereby an employer agrees, in substance, to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

The NMU argues to us, as it did before the Board, that the clause was entirely proper because its objective was to preserve work for its members. Both parties, and the intervenors, support their positions with language from *National Woodwork,* supra, the only section 8(e) case decided by the Supreme Court.

National Woodwork involved a contract provision negotiated by the Carpenters Union under which its members would not "handle" doors which had been "fitted" prior to being furnished on the job. Such precut and prefitted doors could be obtained from manufacturers, but doing so eliminated preparatory work which had been "traditionally performed in the . . . area by the carpenters employed on the jobsite." 386 U.S. at 615-616, 87 S.Ct. at 1253. The Supreme Court held in a 5-4 decision that the contract clause was lawful because it was intended to protect and preserve work customarily performed by employees in the bargaining unit. The Court pointed out that Congress did not intend to obliterate the longstanding distinction between union pressures directed toward "primary" objectives and identical pressures aimed at "secondary" objec-

tives. Id. at 620, 633-635, 87 S.Ct. 1250. According to the Court:

> The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-á-vis* his own employees.

Id. at 645, 87 S.Ct. at 1268. Putting it another way, the test is

> whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere.

Id. at 644, 87 S.Ct. at 1268. The Court surmised that such criteria would not always be simple to apply. Id. at 645, 87 S.Ct. 1250. Subsequent cases, cf. Journeymen Plumbers Local 636 v. NLRB, 139 U.S. App. D.C. 165, 430 F.2d 906 (1970); NLRB v. Milk Drivers Local 753, 392 F.2d 845 (7th Cir. 1968); A. Duie Pyle, Inc. v. NLRB, 383 F.2d 772 (3d Cir. 1967), cert. denied, 390 U.S. 905, 88 S.Ct. 819, 19 L.E.d.2d 871 (1968), and this litigation prove the prophecy correct.

The NMU clause here was in a sense aimed at the labor relations of the primary employer, since it required Commerce to provide for continuation of the collective bargaining agreement, if the ship were sold. On the other hand, the clause was also "addressed" to the labor relations of the secondary employer,[7] since it required Vantage to be or to become an NMU employer, to the extent of manning the Barbara. As to whether the clause was calculated to satisfy union objectives "elsewhere," it can fairly be said both that the NMU objective of making sure that the unit remained under the protection of the NMU agreement was

[7] Indeed, as noted above, as a result of the NMU's efforts to enforce the clause, Vantage was confronted with the threat of a strike by the SIU on Vantage's own vessels.

not an objective "elsewhere," and that the union's aim to convert any prospective purchaser to an NMU contract was.

Despite the closeness of these competing arguments, we are persuaded that the Board's decision was correct. While the clause at issue here has aptly been described as introducing "a new twist to Section 8(e) litigation," The Developing Labor Law 107 (1971 Supp.), the established distinction between "union standards" and "union signatory" subcontracting clauses is analogous. The former, which restrict subcontracting to those who observe certain pay scales and conditions of employment, are valid. Painters District Council 48 v. NLRB, 117 U.S. App. D.C. 233, 328 F.2d 534 (1964); Kennedy v. Sheet Metal Workers Local 108, 289 F.Supp. 65, 78 (C.D.Cal. 1968); Teamsters Local 386, 198 N.L.R.B. No. 129 (1972). The latter, which permit unit work to be transferred to other employers only if they are under contract with the union, are usually held illegal. NLRB v. Milk Drivers Local 753, 392 F.2d 845 (7th Cir. 1968); NLRB v. Teamsters Joint Council 38, 338 F.2d 23, 28 (9th Cir. 1964); Meat & Highway Drivers Local 710 v. NLRB, 118 U.S. App. D.C. 287, 335 F.2d 709, 717 (1964). But cf. NLRB v. Sheet Metal Workers Local 28, 380 F.2d 827 (2d Cir. 1967) (no violation of section 8(e), although clause was a union signatory clause on its face, where six-month period for initiating unfair labor practice charge on basis of clause itself had expired and where specific instance of application of clause did not involve impremissible secondary objectives).[8]

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[8] Relying on *Sheet Metal Workers*, the NMU argues that even if Article I, section 2 is analogous to a union signatory clause, the Board's order is nonetheless erroneous because the clause was not illegally applied here. The argument has no merit; the NMU's efforts to enforce the clause have interfered with the labor relations of a neutral employer, inciting the SIU to threaten to strike all Vantage ships. See note 6 supra.

Opinion of Court Below

While the distinction between union standards and union signatory clauses may seem somewhat artificial,[9] in the ordinary situation it serves at least two purposes: First, under a union standards clause, the union cannot insist that the secondary employees be organized by one of *its* locals. Thus, a competing union that has established similar wage scales and working conditions cannot be discriminated against through a work standards clause. Second, the courts' insistence on union standards clauses makes it somewhat more likely that the union will not sacrifice the interests of employees in the primary unit in the hope of making gains on another front. To get a restrictive clause in the contract, the union may have to give up demands for other employee benefits. If the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units. If the clause is a union standards clause, however, the union will have no guarantee that the prospective subcontracting firm's employees will be members of the union. Thus, the likelihood that the clause is designed to foster the interests of the primary employees is somewhat greater.

The union standards-union signatory distinction suggests enforcement of the Board's order. We will assume without deciding that the NMU could legitimately have insisted that Commerce sell no ships unless union standards

[9] See Note, A Rational Approach to Secondary Boycotts and Work Preservation, 57 Va.L.Rev. 1280, 1293 (1971).

were preserved.[10] But for the NMU to bargain for a clause that gives it the right to continue manning the ship from its hiring hall goes beyond "work preservation" of the kind sanctioned in *National Woodwork* and the lower court cases in this area. The circumstances of the arrangement make it clear that the NMU's motivation was to protect the union's interest, rather than the interest of the work unit and its members. The practice of the shipping industry is for the purchaser's union to man newly-acquired vessels. This practice accords with the fleet-wide representation rule prescribed for the industry by the Board. Moore-McCormack Lines, Inc., 139 N.L.R.B. 796, 798-99 (1962). The NMU, of course, has no thought of abandoning its claims on any ships that are sold to an NMU company. Under the clause in this case, however the NMU extends its claim to ships *leaving* NMU companies. If transfers of ships are, as the Board found, fairly common in the industry, this practice will result, eventually, in NMU representation of virtually all the American-flag vessels in the trade or if the SIU retaliates, in constant disruption of the sore experienced here. Despite the NMU's claims that it is merely attempting to avoid erosion of its place in a dying industry, the broader impact of its "work preservation" clause is to advance its own organizational goals at the expense of the SIU. Clear anti-SIU motivation appears in the record in this case and was quoted in this court's

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[10] Since the union standards-union signatory distinction was developed largely in cases involving subcontracting, it is arguably inapposite here. Commerce's sale of its last ship might be compared to an employer's decision to close his factory and terminate his business altogether. But the Supreme Court has noted that the decision to terminate business is peculiarly a matter of management prerogative, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 270, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965), and we cannot conceive that a union would be entitled to seek more far-reaching job protection in that situation than in the ordinary subcontracting case.

decision in National Maritime Union v. Commerce Tankers Corp., supra, 457 F.2d at 1127, 1130 n.3.[11] See also McLeod v. National Maritime Union, 457 F.2d 490 (2d Cir. 1972); National Maritime Union, 174 N.L.R.B. 216 (1969). Not surprisingly, the cases indicate that such an objective is not protected as primary. See NLRB v. Operating Engineers Local 825, 400 U.S. 297, 91 S.Ct. 402, 27 L.Ed.2d 398 (1971); NLRB v. Milk Drivers' Local 753, 392 F.2d 845, 848 (7th Cir. 1968); cf. NLRB v. Sheet Metal Workers Local 28, 380 F.2d 827, 831 (2d Cir. 1967) (absence of anti-rival union animus cited as one basis for concluding respondent union did not violate section 8(e)). Indeed, the elimination of inter-union rivalry with respect to employees of the same employer and the consequent diminution of conflicts which may result in work stoppages are among the principal goals which the Board seeks to attain through implementation of its fleet-wide representation rule. Moore-McCormack Lines, Inc., supra, 139 N.L.R.B. at 798-99.

A second relevant factor is that it is the NMU's practice to remove all the seamen from a ship whenever the ship is sold. Therefore, the men working on the Commerce vessel will lose their jobs regardless of which union gains control of the ship.[12] The only difference will be that under the NMU contract, the jobs will be available to seamen with seniority in the NMU hiring hall, while under an SIU contract the SIU hiring hall will be used. Thus, the beneficiaries of the union's clause will not be those members now employed on the vessel, but the union as a whole. True,

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[11] This decision contains language which, at first glance, may appear to settle the issue of the legality of Article I, section 2, but we there held only that the Regional Director had "reasonable cause to believe" that the clause violated § 8(e).

[12] When the S.S. Thalia was sold to an NMU-affiliated employer, all of the ship's unlicensed seamen were removed from their jobs and replaced through the NMU hiring hall.

the NMU emphasizes that the Board assumed without deciding that the bargaining unit for Commerce employees could include seamen who may in the future be referred from the NMU hiring hall to Commerce. Interpreting this to mean that the Commerce bargaining unit could include all those entitled at any time to use the NMU hiring hall, the NMU argues that the clause is clearly lawful because prior case law establishes that a contractual provision designed to preserve work for employees in the bargaining unit is valid. We cannot accept this argument. While the cases may use the bargaining unit as a yardstick for the permissible scope of a work preservation clause, we are aware of none that do so where, as here, the suggested bargaining unit is many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have had no contact at all with the employer. Moreover, as the Board urges, if the NMU's argument were correct, Congress would have had no reason to enact the proviso to section 8(e) which validates union signatory agreements with respect to job site work in the construction industry,[13] since the hiring hall, upon which NMU's argument is based, is apparently the central source of employment in the construction industry, Teamsters Local 357 v. NLRB, 365 U.S. 667, 672-673, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961), as it is in the maritime industry.

Petition for enforcement granted.

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[13] The "construction industry" proviso to § 8(e) reads:

> Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .

29 U.S.C. § 158(e).

Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 2—CE—44

—o—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO;
COMMERCE TANKERS CORPORATION

and

VANTAGE STEAMSHIP CORPORATION.

—o—

On September 2, 1971, Trial Examiner Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel, Charging Party, and Intervenor[1] filed exceptions and supporting briefs; Respondent National Maritime Union filed a brief in opposition and Respondent Commerce filed a brief. On February 7, 1972, oral argument was held before the Board at which time all parties were represented and presented their positions.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and oral argument and has decided to affirm the Trial Examiner's rulings, findings, and conclusions only to the extent consistent with the following.

Respondent Commerce Tankers Corporation (hereinafter called Commerce) is a New York corporation engaged in the business of owning and operating American Flag freight ships used for transporting goods and commodities. In July 1969, Commerce entered into a 3-year collective-bargaining agreement with Respondent National Maritime

[1] The Board by order of January 6, 1972, granted the motion of Seafarers International Union of North America to intervene.

Union (hereinafter called NMU) recognizing NMU as the exclusive bargaining agent for all unlicensed seamen employed on its vessels. Although it was not a member of any employer association for bargaining purposes, Commerce agreed to the same contract negotiated between the NMU and the Tankers Service Committee, a multi-employer association of ship owners. The contract also contained provisions, quoted in full in the Trial Examiner's Decision, to the effect that, in the event of a sale, Commerce would give NMU timely notice prior to the sale and obtain a written undertaking by the purchasers that it would recognize NMU as the bargaining agent for the vessel's unlicensed seamen and would accept the terms and conditions of the existing collective-bargaining agreement.

On December 23, 1970, Commerce entered into an agreement with Vantage Steamship Corporation,[2] the Charging Party, to sell its last remaining vessel, the SS *Barbara*.[3] This sales agreement contained no provision for compliance with "Article 1, Section 2" of the Commerce-NMU collective-bargaining agreement. When the NMU learned that Commerce had not complied with the terms of the collective-bargaining agreement, it demanded pursuant to said agreement arbitration of the dispute with Commerce. On February 8, 1971, the arbitrator issued an award[4] enjoining Commerce from selling the Barbara until Commerce

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[2] Vantage is a shipping company operating approximately four tankers with its unlicensed seamen represented by the Intervenor, Seafarers International Union.

[3] Commerce's other vessel, SS *Thalia*, had previously been sold in compliance with the contract.

[4] As the arbitrator's award dealt solely with the interpretation of the contract and did not consider the unfair labor practice issue, the Board will not defer to this award. *Monsanto Chemical Company*, 130 NLRB 1097, 1099.

complied with article 1, section 2, of the collective-bargaining agreement.[5]

In the interim, Commerce notified Vantage that the sale could not be consummated absent the undertaking required by the NMU labor agreement.[6] Vantage responded by rejecting any obligation to assume the NMU contract, noting that it was not part of the contract of sale, and filed unfair labor practice charges against both NMU and Commerce alleging violations of Section 8(e) of the Act. The Trial Examiner found that the contract clauses were lawful work preservation clauses saying "no more than the jobs of the employees covered by the contract could be saved for them in the event of a sale . . ." He further found that Commerce's employees constituted a separate single-employer bargaining unit consisting of all seamen who are presently working or would in the future work on tankers of Commerce under the provisions of the hiring hall, and that the NMU had the lawful right to preserve this work. Accordingly, he found no violation of Section 8(e) and recommended dismissing the complaint. The General Counsel, Charging Party, and Intervenor have excepted to the Trial Examiner's findings, contending that the clauses had an object outside the scope of the appropriate bargaining unit and were secondary in nature. Accordingly, they contend that the clauses were being used

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[5] This award was confirmed on March 2, 1971, and a preliminary injunction restraining Commerce from selling the vessel was issued. *National Maritime Union of America* v. *Commerce Tankers Corporation,* 325 F.Supp. 360 (D. C. N. Y., 1971). On appeal the injunction was vacated. See *McLeod* v. *National Maritime Union* [*Prudential-Grace Lines, Inc.*]. F.2d (C. A. 2, March 17, 1972).

[6] Commerce on January 13 notified NMU in writing that the sale of the vessel would be in compliance with art. 1, sec. 2, of their contract. Accordingly, based on the above evidence, we find that Respondent Commerce reaffirmed this provision within 6 months of the filing of the charge herein.

to further union institutional interests and not to preserve the work for Commerce's present or dislocated employees.

We agree with the positions of the General Counsel, Charging Party, and Intervenor for the following reasons:

At the outset, it should be noted that in the maritime industry the sale of a vessel is a fairly common occurrence. Thus, in the years 1964 to 1971, approximately 400 American Flag vessels (ocean-going merchant-type ships of 1,000 gross tons and over) averaging 50 per year were sold from one U.S. company to another.[7] Similarly, during this same period approximately 150 U.S. Flag vessels were transferred foreign, excluding vessels sold foreign for scrapping. Accordingly, the transactions involved herein do not represent a novel situation but occur in the normal course of doing business in the maritime industry. In these circumstances we conclude that in the maritime industry buyers and sellers of ships are doing business with each other within the meaning of Section 8(e). As it is unnecessary to our decision, we have not considered questions concerning the applicability of this section to the sale of capital assets in other industries or in other circumstances.

As the Supreme Court has stated, the basic question in determining if Section 8(e) has been violated is whether the "Union's objective was preservation of work for [unit] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[8] Thus, where an

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[7] These statistics, of which we take administrative notice, are a matter of public record compiled by the U.S. Department of Commerce, Maritime Administration.

[8] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644-645.

object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful.[9]

As the Trial Examiner recognized, these basic principles lead to the necessity of determining the scope and composition of the unit in question, and we agree with his conclusion that the appropriate unit is the single-employer unit and not a multiemployer or industrywide unit. And we can assume without deciding that this single-employer unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce. But such an assumption does not lead to the Trial Examiner's conclusion that the clauses in issue are lawful work preservation clauses which do no more than save the jobs of the employees covered by the contract in the event of a sale.

Thus, because of the unique nature of this industry, virtually all hiring is accomplished through hiring halls located in various ports. An employee is referred to a ship on a permanent basis and retains that position for as long as that ship operates out of the port of referral. However, when a ship is either sold, operated out of another port, or placed in layup status, the employees lose their jobs and a new crew is referred, either through the hiring hall in the new port or when placed back in service through the hiring hall in the old port.[10] As a practical matter therefore, in the light of this practice, although each ship has a permanent stable work force of employees assigned to it through the hiring hall, whom the Union clearly has a lawful interest in protecting against job loss, the clauses in question in

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[9] *Meat and Highway Drivers, Local 710, Teamsters* [*Wilson & Co.*] v. *N.L.R.B.*, 335 F.2d 709, 716 (C. A. D. C.).

[10] When the vessel *Thalia* was sold by Commerce to an NMU signatory, for example, the Commerce crew left the ship and a new crew was referred from the hiring hall in the new port.

fact *do not* protect those employees at all in the event of a sale, but instead, as here, serve to preserve those *jobs* for those other seamen who may be eligible for referral through the NMU hiring hall at the different port out of which the new owner is to operate. In these circumstances, these clauses place restrictions on sales which are not strictly "germane to the economic integrity of the principal work unit . . ."[11] Instead they only insure that the purchasing employer is under contract with the NMU. Consequently, to conclude that these clauses are lawful would obliterate the distinction between unit work preservation and union signatory clauses and nullify the congressional purpose of Section 8(e).

Accordingly, on the basis of the foregoing considerations, we find that the NMU's work preservation argument is without merit and that the contract is not valid under Section 8(e) of the Act.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, National Maritime Union of America, AFL-CIO, its officers, agents, and representatives, and Commerce Tankers Corporation, its officers, agents, successors, and assigns, shall:

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[11] *Orange Belt District Council of Painters No. 48* [*Calhoun Drywal Co.*] v. *N. L. R. B.*, 328 F.2d 534, 538 (C. A. D. C.).

[12] Although not germane to our decision, we do not adopt the Trial Examiner's interpretation of *Moore-McCormack Lines, Inc.*, 139 NLRB 796. See *National Maritime Union of America, AFL-CIO (Overseas Carriers Corporation)*, 174 NLRB 216, and *National Maritime Union of North America, AFL-CIO (Prudential-Grace Lines, Inc.)*, 194 NLRB No. 199.

1. Cease and desist from entering into, maintaining, enforcing, or giving effect to article 1, section 2, of the collective-bargaining agreement entered into on July 1, 1969, between Respondent NMU and Respondent Commerce, or to any like or related clauses in any other collective-bargaining contract whereby an employer agrees, in substance, to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

2. Take the following affirmative action:

(a) Post at Respondent NMU's business offices and meeting halls and at Respondent Commerce's place of business copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

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[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision and Order

Dated, Washington, D.C., May 16, 1972.

/s/ EDWARD B. MILER
Chairman

/s/ JOHN H. FANNING
Member

/s/ HOWARD JENKINS
Member

/s/ RALPH E. KENNEDY
Member

/s/ JOHN A. PENELLO
Member

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

To all members of National Maritime Union of America, AFL-CIO, and to all employees of Commerce Tankers Corporation

WE WILL NOT enter into, maintain, enforce, or give effect to article 1, section 2, of our collective-bargaining agreement, or any other contract provision whereby any employer ceases or refrains or agrees to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

NATIONAL MARITIME UNION
OF AMERICA, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

COMMERCE TANKERS
CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0300.

/s/ ROBERT VOLGER
Associate Executive Secretary

Trial Examiner's Decision

[Dated September 2, 1971]

Statement of Case

Thomas A. Ricci, Trial Examiner: A hearing in the above-entitled proceeding was held before the duly designated Trial Examiner on July 6, 1971, at Brooklyn, New York City, on complaint of the General Counsel against National Maritime Union of America, AFL-CIO, herein called the NMU, and Commerce Tankers Corporation, herein called Commerce. The charge was filed by Vantage Steamship Corporation on February 16, 1971, and the complaint issued on June 9, 1971. It alleges that the two Respondents have violated and are violating Section 8(e) of the Act by maintaining and giving effect to a secondary boycott agreement between themselves. All parties participated in the hearing. All parties also stipulated that the transcript of testimony, and the exhibits received, in an injunction proceeding heard in the United States District Court for the Southern District of New York on June 4, 1971, be received as evidence here, and be considered by the Trial Examiner in making his decision in this case as though those witnesses had testified before the Trial Examiner and those exhibits taken into evidence by him. Briefs were filed by the General Counsel, both Respondents, and the Charging Party. An *amicus curiae* brief was also received from Seafarers International Union of North America and it affiliates, here collectively called the SIU.

Upon the entire record, and from my observation of the sole witness who appeared at the hearing, I make the following:

FINDING OF FACT

I. The Business of the Shipping Companies

Vantage Steamship Corporation, a New York State corporation, has its principal office in New York City and

is engaged in the business of owning and operating American flag freight ships used for transporation of goods and commodities in interstate and foreign commerce. During the calendar year 1970, a representative period, Vantage derived a gross revenue in excess of one million dollars in the course of its business. Commerce Tankers Corporation, a wholly owned subsidiary of Vernitron Corporation, a New York corporation, is also engaged in the business of owning and operating American flag freight ships used for transporting goods and commodities in interstate and foreign commerce. During 1970 it derived a gross revenue in excess of $500,000 in the course of its operations. I find that Vantage and Commerce are engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to exercise jurisdiction herein.

II. The Labor Organization Involved

I find that National Maritime Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The Issue Presented

This is a secondary boycott case and presents essentially a question of law. There is no serious dispute as to the pertinent facts for they rest almost entirely upon documents received in evidence. What is to be inferred from these facts, how certain Board and court decisions related to the issue of this case are to be read, constitutes the substance of the five separate briefs submitted by the competing lawyers who appeared at the hearing. Like the facts proved by admittedly authentic evidentiary docu-

ments, the decisional precedents themselves, of course, cannot be changed.

In 1969 Commerce, a shipping company, owned and operated two seagoing tankers—the *S.S. Thalia* and the *S.S. Barbara;* in July of 1969 it signed a 3-year collective-bargaining agreement with the NMU covering unlicensed seamen employed on these vessels. It is a 100-page printed booklet and includes the following clause:

Article 1.

Section 2. Sale and Transfer of Vessels. (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in acordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect

> and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

On December 23, 1970 Commerce executed a contract to sell the *S.S. Barbara* to Vantage, another shipping company which was at the time operating four tankers, either directly owned or under agency with commonly owned corporations; the sales agreement contained no provision for compliance, on the part of Commerce, with Article 1, Section 2, of its NMU agreement. The unlicensed seamen working for Vantage were then and still are represented by the SIU, under regular union contract. When the NMU learned that Commerce had not arranged for Vantage to employ "the complement of employees" used by Commerce on the *S.S. Barbara,* nor exacted from Vantage "a written undertaking with the Union" guaranteeing that the "terms and provisions" of the NMU agreement would continue to apply to the *S.S. Barbara,* it demanded, by letter dated January 11, 1971, that Commerce do so. On January 13, the president of Commerce replied he had advised his Company's selling agent that the "NMU . . . must continue to man the vessels after their sale, and that this was to be made a condition of the sale; . . ." Commerce then tried to persuade the NMU to waive Article 1, Section 2, in the case of the *S.S. Barbara,* was unsuccessful, and advised Vantage, by telgram dated February 6, that "a written undertaking to comply with the terms and conditions of the Union [*NMU*] agreement" had to be executed by Vantage else the sale might not be consummated.

At this point the NMU invoked the arbitration clause of its collective-bargaining agreement with Commerce, won an arbitration award, and then obtained a court injunction in the Federal District Court stopping the sale.[1] Commerce

[1] *NMU* v. *Commerce Tankers,* 76 LRRM 2692.

contested both the arbitration and injunction proceedings. On February 16, 1971 Vantage filed an unfair labor practice charge against both NMU and Commerce.

It is alleged that in January and February of 1971 NMU and commerce "reaffirmed" their 1969 contract with respect to Article 1, Section 2, and thereby violated Section 8(e) of the Statute.[2] The theory of illegality is that by their agreement the two parties enabled NMU to effectuate its design against other employers—in this instance Vantage—, to negotiate conditions of employment of NMU members working for employers other than Commerce. In the total picture so presented, it is said, Vantage is the primary employer and Commerce the secondary one, hence, a viola-

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[2] 8(e) it shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, that for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or in industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, that nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

tion of Section 8(b) (4),[3] or, a secondary boycott brought about by the type of hot cargo contract outlawed by Section 8(e).

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[3] Section 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

NMU defends on the ground that the clauses under attack are no more than work preservation or work standards preservation provisions, entirely lawful under the decided cases. Commerce argues that even assuming the clauses were illegal in the circumstances, the complaint must be dismissed with respect to the employer party to the agreement because more than 6 months had passed after its initial execution before the charge was filed. See Section 10(b) of the Statute. It denies that it "reaffirmed" the agreement within the 6-month period immediately preceding the filing of the charge, and asserts instead that it always disputed the validity of the clauses and resisted enforcement at every turn. Commerce also contends that in any event it must be entirely exculpated because it only accepted the entire agreement in consequence of economic pressure brought by the NMU, against its better judgment. Neither of these defenses—Statute of limitation and economic coercion by the NMU—need be answered in this decision, because the complaint must be dismissed on the ground that the NMU contract is not unlawful.

Vantage, the Charging Party, joined with the General Counsel in saying the contract on its face, and in the light of extrinsic evidence, is aimed at achieving a secondary and prohibited goal. And the SIU, participating in this case as *amicus*, "concurs" with the arguments set out in the briefs of both the General Counsel and Vantage, and reiterates the contention Article 1, Section 2, is tantamount to a hot cargo clause.

THE GENERAL COUNSEL'S PER SE THEORY OF ILLEGALITY

At the hearing the General Counsel explained that the complaint is intended to prove the commission of unfair labor practices in two ways, or perhaps two separate unfair labor practices by each Respondent, one by mere appraisal of Article 1, Section 2, apart from any extrinsic evidence, and the other after consideration of facts external to the

contract.[4] Throughout the hearing, however, as well as in his brief, the General Counsel, and the Charging Party, offered evidence on many facts standing apart from the contract itself, and both merged their contentions so as to obscure the per se argument. Indeed, at one point the General Counsel objected to evidence offered by the Charging Party on the ground that it is not relevant to the issue of the complaint at all. In their totality, the related or unrelated facts placed in evidence are intended to support two broad assertions of the prosecution side. One is that National Labor Relations Board "doctrine" precludes bargaining units smaller than "fleetwide" in scope in the shipping industry, and that therefore, regardless of the wording of the subject clauses, they are unlawful because Commerce is or was engaged in shipping. The second is that, unlike people who are employed by other companies, seamen are assigned to their jobs and go to work in rotation out of a hiring hall, and that for this further reason, again no matter how Article 1, Section 2 be written, it must be prohibited.

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[4] From the transcript:

Q. (By the Trial Examiner): ". . . in order to hold . . . these clauses . . . illegal? Is it necessary to look outside that contract at all?

* * *

A. (By Mr. Bennett): "I think not. I think without any intrinsic (sic) evidence at all, this contract is invalid.

Q. To hold this contract illegal with respect to the clauses mentioned in the complaint, it is necessary to look anywhere for anything?

Mr. Bennett: It is not necessary, no.

* * *

From the transcript in the District Court:

Mr. Bennett: . . . the only reason we bring up the sale of the Barbara at all in this proceeding is to show how the clause, the NMU clause, actually operates in practice, but the issue before you actually could even be decided without this testimony."

On its face the contract language being examined limits Commerce's freedom to do business with other employers; it cannot sell vessels to prospective purchasers who refuse to hire the old seamen and who refuse to continue their existing conditions of employment. Although this fact alone fits the clause literally into the expressed proscription of Section 8(b)(4), it is not therefore unlawful. This much is conceded by all parties. *National Woodwork Mfgrs. Assn.* v. *N.L.R.B.* 386 U.S. 612. Reading further, the contract provides that vessels can only be sold "with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this agreement," and that the purchaser must agree, in writing, that it will abide with all the "terms and provisions" of the entire NMU contract. Clearly this language says no more than that the jobs of the employees covered by the contract are to be saved for them in the event of sale of part or all of the business, or, in the language of the cases, "work preservation." For legal precedents, see *Kennedy* v. *Sheet Metal Local 108,* 280 F.Supp. 65, 68 LRRM 3057. It no less clearly says the purchaser must also honor the established wage scale, and other conditions of employment, what the cases call "preservation of work standards." These are the lawful objectives which any union may seek to assure to the employees in a collective-bargaining agreement, despite the seeming limitation imposed by Section 8(b)(4). The contract does not speak of membership in one union or another, or of strangers to the contract bargaining unit.

Conceding that a union has a right to protect the jobs of the employees it represents, and to concern itself about their pay and other emoluments in the event of a change

in the identity of their employer,[5] the General Counsel nevertheless sees evil in the fact this clause also requires the purchaser to sign something to that effect. He therefore calls it a "signatory" clause, and likens this case to other situations where the contracting employer may only do business with employers who have "signed" contracts with the same union. The position exalts words over substance. When a successor takes over the existing complement of employees, whether it does so voluntarily or because the seller will not otherwise transfer the business to him, he is not only obligated in law to recognize and deal with the union already functioning for the employees (*Maintenance, Inc.*, 148 NLRB 1299), but he is also required to honor the contract that is in effect. *Burns International Detective Agency*, 182 NLRB No. 50, reversed, 441 F. 2d 911 (C.A. 2), with deference to the Court. Had Vantage taken over the *S.S. Barbara* with its seamen complement, it would have been obligated to recognize and deal with the NMU, and indeed to honor the NMU contract. If saddling Vantage with the NMU contract is secondary because that company is not the employer at the time the Respondent Union's contract is signed, does the Board do violence to Section 8(b)(4) when it burdens the successor with a predecessor's contract? To require of Vantage that it also sign some document to assure accomplishment of both objectives therefore in no way alters the substance of what lay at the bottom of Article 1, Section 2, or of what is literally expressed therein. The right to work preservation would appear particularly equitable here in view of uncontradicted testi-

[5] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543: "The objectives of national labor policy, reflected in established principles of Federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

mony that the "thrust" of unionism among unlicensed seamen was "more toward job security," "equitable distribution of available work," than toward "economic benefits."

One other phrase appears in the clauses and is suggested as indicating an illegal objective—protection of job rights for seamen other than employees of Commerce covered by the contract. The clause speaks of "the complement of employees who either are or shall be provided by the Union in accordance with the terms of this agreement." This language is direct reference to Article 1, Section 8, "Employment Review Board," of the same contract. This clause sets up a hiring hall, here called an "employment office," from which by agreement of the parties to the contract vacancies on the vessels are filled according to precise arrangements of priority detailed in the agreement. Sailors come and go on ships, for it is the nature of the industry today, and has been since the time of Ulysses. More below about the hiring hall.

It is conceded that if Article 1, Section 2, be deleted from the NMU contract there would be nothing unlawful in it. Considered apart from all else that appears in the record, there is nothing unlawful about it even including Article 1, Section 2.

The Moore-McCormack Case: 139 NLRB 796

The many collateral facts offered by both unions as well as by both companies, in one way or another touch upon the question of appropriate bargaining units, industry-wide, fleetwide, multiemployer, single employer, single vessel, etc. Clarification of conflicting contentions can only follow definitive statement of what the Board has decided on this subject in past decisions. The principal case upon which the General Counsel and the SIU side

of the dispute rely is *Moore-McCormack,* decided in 1962. As they read that decision, the Board there "enunciated" "a general proposition," a "general rule," a "doctrine," that in the shipping industry bargaining units must be fleetwide, that is, must encompass all vessels owned by any single shipping company in a single unit of its own. So reading the Board's decision in *Moore-McCormack,* the General Counsel argues that "by operation of Board law" Vantage could not deal with the NMU for seamen on the *S.S. Barbara* even if it so wished, that the newly acquired vessel was merged into the existing four-ship fleet-wide unit of Vantage, and, in the end, that its seamen of necessity must be represented by the SIU under whatever terms and conditions of employment are provided in the SIU contract. It is stipulated by all that the substantive terms, including economic benefits, differ, as between the NMU and the SIU contracts.

Apart from considerations that would otherwise have to be dealt with, this entire argument falls if only because *Moore-McCormack* does not establish any such rule of law. Indeed, the Board's *decision* in that case goes exactly the other way. Automatic absorption of any acquisition into an existing bargaining unit is simply not the law. In 1957 *Moore-McCormack,* already operating a fleet of seagoing freighters with seamen represented under NMU contract, bought eight operating vessels from Seas Shipping Co. The unlicensed seamen then on the Seas Shipping vessels were represented by the SIU. NMU made the argument that new vessels had to be absorbed into *Moore-McMormack's* existing unit, that only a fleet-wide unit could be appropriate in the shipping industry. And SIU insisted the newly acquired ships could, and should remain SIU vessels if the seamen so wished. The Board rejected the so-called accretion argument and refused to lump the added vessels with the old. Five years later, in 139 NLRB 796, the Board reaffirmed its earlier decision, and again

refused to merge the now seven remaining Seas Shipping vessels into the NMU group without a majority vote of each of the vessels.

What the SIU relies upon today, to support its now diametrically opposite view, is passing language by three Board members in their weighing of the balancing factors that are always considered when the Board makes unit determinations under the Statute. Those Board members recognized the desirability, for more than one reason, of fleet-wide units among ships. Two Board members disassociated themselves from that descriptive language. If a rule can be said to emerge from that decision in its entirety—after the Board was through finding that the countervailing facts of the case dictated smaller than fleet-wide units—it is that every case must be decided upon its own facts, as has been done since 1935. "But these reasons for finding a fleet-wide unit appropriate may be overborne in a particular case by special circumstances which indicate the unsuitability of applying the general rule."

But this mistaken reliance upon *Moore-McCormack* falls short of condemning Article 1, Section 2, of the NMU contract for an additional reason. If the purchaser had been a newly formed company, or one that had never operated seagoing tankers, would the restrictive clause be deemed proper? It is difficult to see how the fortuitous circumstances of a particular purchaser could serve to make an otherwise lawful contract illegal.

Single Versus Multiemployer Unit

In the end the varied contentions urged by every one of the disputants here focus upon the special nature of the hiring hall. It is therefore necessary, still before reaching that question, to make clear the scope of the

unit of Commerce employees who are, or were covered by its union contract. As written, the contract is between "the Company" and "the Union as the sole collective-bargaining agent for the unlicensed personnel employed aboard all vessels of the Company. . ." It was signed by Commerce and NMU as direct and single parties. It must be found that the unit underlying the contract is limited to the employees of Commerce, a single employer bargaining unit. The agreement was negotiated between the NMU and the representatives of Tankers Service Committee, an association of shipping companies. Commerce has never been a member of that, or any other multiemployer association. It did not authorize the committee to represent it in collective bargaining, it did not ratify or adopt whatever the committee did or signed, it never delegated authority to any group or association to bargain on its behalf. It is conceded that in all its dealings with the NMU Commerce acted alone, entirely separate from the collective-bargaining representative of any other employer. See, *Moveable Partitions, Inc.*, 175 NLRB No. 149: "While it [the employer] has adopted contracts negotiated by the Master Painters Association, this alone is not a sufficient basis for including it in a multiemployer unit."

All of the shipping companies which have signed the identical contract, whether members of Tankers Service Committee or separate independent employers, together use the single NMU hiring hall when seamen are required on their vessels. From this one fact NMU contends there has come into being a multiemployer bargaining unit joining all employers who have signed this contract and who use this hiring hall. ". . . all the seamen shipping aboard NMU contract vessels are for practical purposes employees of all the contract employers." The position ignores too much Board law and too many basic principles underlying the Statute as a whole, to be persuasive. Every employer has a right to bargain with respect to its employees and

only its employees; indeed the Statute speaks first and foremost of the "employer" unit as appropriate. More important, employees have a right to decide for themselves how to deal with their own direct employer. These principles are not obliterated by the fact that Commerce, like the other employer parties to the NMU contract, pays for vacations earned by its seamen by contributing a certain amount into a common vacation fund then enjoyed by all seamen who find work out of the hiring hall, or that it contributes to a common welfare and pension fund, similarly administered on a broader fiscal basis. Commerce still pays only what is due under its contract for work performed by its employees on its vessels. If the employees of Commerce choose to mix the benefits they receive on these aspects of their employment conditions which like benefits they earn when working for other companies on other sea voyages, it is a matter that stands apart from their collective-bargaining relations with this employer.

EMPLOYEES INCLUDED WITHIN THE SINGLE-EMPLOYER UNIT

The final attack upon Article 1, Section 2, is that it is not only aimed at preserving work for the employees employed by Commerce, or included within the single-employer bargaining unit which underlies this agreement, but is also intended to look after the work standards and job rights of unrelated seamen, members of NMU who have nothing to do with this contract at all. And this argument, like the others, points to the operation of the hiring hall as evidence, not to the language of the clause itself.

It is a rule of law that a work preservation clause is lawful only when it is restricted in operation to the limits of the bargaining unit involved, or to the employees who normally work within that unit. As stated by the Board

in *International Union, United Mine Workers*, 165 NLRB 467: ". . . where an object of a clause is to aid the union members generally rather than members of the unit, the object is secondary and unlawful. This observation leads, of course, to the necessity of determining the scope of the unit in question." A more pertinent wording of the rule appears in *Orange Belt District Council* v. *N.L.R.B.*, 328 F. 2d 534 (C.A.D.C.):

> "We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and seek "to protect and preserve the work and standards [the Union] has bargained for," or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."

Unlike the more common bargaining agreement, the NMU contract does not in *haec verba* set out a description of the bargaining unit; it speaks only of "unlicensed personnel," and this is because for maritime employment there has come into being the hiring clause. Identification of the employee complement covered by union contract in this case, therefore, is a bit more indirect than usual. Whose work is it that the Union seeks, and has a right to preserve? In the search certain fundamental truths must be kept in mind. (1) Every labor contract presupposes the Union speaks for somebody, and a basic bargaining unit there always must be. The NMU could not otherwise have standing at all as the exclusive representative of anybody, and its such status in this case is not questioned. (2) While every union acts as agent for employees, human beings working for a living, the bargaining unit is conceived in terms of jobs, occupations, positions, and not in terms of the particular individuals who fill the jobs at any given moment. Every unit description set out

in a Board direction of election lists occupations, or job classifications, and never lists the names on the payroll. And whenever, in resolving a question concerning representation, the Board considers questions of eligibility, such as when ruling on challenges, its decision turns upon the nature of the job—part-time, seasonal, craft or non-craft, etc.—and not on whether it is Tom, Dick or Harry who is at work. (3) The fact that individual workmen at times enter the unit and at times leave it neither destroys the unit nor alters it. Some units are more consistently occupied by the same body of workmen than others. Whenever a union contracts to preserve the work opportunities for a very stable employee complement, the fact that four or five of perhaps 50 positions are vacant at any given moment does not free the employer to contract away those jobs in violation of the work preservation clause in the agreement. (4) Use of a hiring hall for rotation filling of unit jobs as they become vacant in the normal operation of the employer's business, is not unlawful, providing the method agreed upon, or practiced, does not encourage or discourage union membership in violation of Section 8(a) (3) of the Act. *Local 357* v. *N.L.R.B.*, 365 U.S. 667.

A final truth not to be forgotten in this case is that the NMU hiring hall operated for East Coast tanker shipping is entirely proper and lawful. The Commerce contract being considered calls the hall an "employment office," details how applicant qualification is determined by a review board composed of management and union representatives, and provides preferential grouping of employees for referral purposes—groups 1, 2, and 3. When the General Counsel stated on the record that if the disputed Article 1, Section 2, were removed from this contract it would be absolutely legal in all respects, of necessity he was saying that the union hall established by the contract is also

in every respect proper. But even apart from the concession, absent a complaint and proof of any improper activity in connection with this hiring hall, the case must proceed on an assumption that it is being correctly administered.

It is against these last enumerated facts, or unquestionable rules of Board law—whatever they be called—that unit questions in secondary boycott cases must be examined. "... the units which control the determination of the primary or secondary nature of subcontracting clauses are those units found by the Board under its customary standards to be appropriate for collective-bargaining purposes ..." *United Mine Workers, supra.*

Returning to the question of this case: Who are the people who are embraced within the bargaining unit underlying NMU's contract with Commerce? They are those seamen, present and future, who are at work, or may hereafter be entitled under the provisions of this hiring hall to go to work, on tankers of Commerce as the normal going and coming of employees on and off the vessels constantly creates the need for referrals—sometimes permanent berths, sometimes temporary places. The NMU has a right to preserve *this* work *for these* people, and it matters not that today one cannot know the identity of a seaman who will tomorrow be entitled to fill the next vacancy. It would be equally irrelevant, to a comparable question of work preservation, if a pattern maker with 20 years of uninterrupted service were to retire; the International Association of Machinists would still be entitled to protect that job for the total employee complement embraced within a machine shop bargaining unit. Neither the question—who is entitled to protection?—nor the answer is changed merely because, as this record shows, a sailor's single voyage may last 5 days or 4 months, because he may take 4 vacations a year, because he can literally "quit" a job and still be entitled to return to the hiring hall roster, or

because half the seamen dispatched from the NMU hiring hall go to temporary jobs.[6]

As the Respondent NMU contends, Article 1, Section 2, is purely a work preservation clause. The General Counsel brought out the fact that it is possible for a man who has worked 10 years on the Great Lakes, for another company there and covered by another NMU contract there, to quality for permanent assignment to a Commerce vessel on the East Coast in the normal operation of this hiring hall. Implicit in his position is the assertion that that man is outside the bargaining unit, that by protecting his work opportunity the NMU is using the Commerce contract in the interests of union members having nothing to do with this one employer, and, in the end, under cover of this ostensible work preservation clause, indirectly encouraging union membership in persons employed by nonunion, or rival union employers. If there were merit in this argument it could be urged with equal force with respect to any seaman who has long worked for another company on the East Coast, shipped out a few wharfs away from the Commerce dock, was never on a Commerce ship berth, and comes up next on the hiring hall seniority roster for assignment to a Commerce vessel. In that event, the entire hiring hall is being operated unlawfully because the NMU is using it as a device to force all employers to discriminate in favor of its members.

The short answer lies in the fact this hiring hall is not illegal, and all seamen who are referred out of it go to

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[6] The composition of the single-employer bargaining unit in the shipping industry as here explained, may not be in conflict with the real intendment of the NMU brief, which says, among other things, "we are not concerned just with the jobs of the particular seamen employed aboard the *S.S. Barbara* at the time the vessel is sold, . . ." What this means is that any seaman having the right under the hiring hall provisions of the single-employer contract may one day qualify for referral, and is therefore conceptually included in the limited unit.

work in one appropriate bargaining unit or another, always correctly places, without illegal discrimination, and within the coverage of the unit description of each separate contract. The hiring hall is objective, it is not invidious, and it is not NMU—membership tainted. So long as each man fits the underlying formula for preferential grouping, and is assigned in keeping with objective criteria, it is immaterial where he worked before. If more be needed to show the fallacy in the prosecution argument, it is the fact, also clear on this record, that a member of the SIU can also qualify, and win employment with Commerce, out of this same hiring hall.

The complaint must be dismissed. The realities, and the substantive legal precedents that lead to this conclusion, are not affected by the many further contentions advanced by the General Counsel and the Charging Party. A month before contracting to sell the *S.S. Barbara,* Commerce sold its other ship, the *S.S. Thalia,* that one to an NMU contract shipping company. Someone said at the hearing that when that happened the seamen on the vessel came off and the berths were opened to bidding from the hiring hall. No one explained the situation that then prevailed on this ship, and the statement in the Charging Party's brief that SIU members were taken off and NMU members put aboard in their place is not based on any evidence. Absent proof of illegal discrimination it must be assumed that work assignments to that ship, like referrals constantly being made from the hiring hall, were in strict accordance with the contract terms and perfectly lawful. Transfer by Commerce to foreign flag ships are not restricted by the work preservation clause. Is saving half a loaf no saving at all because it does not save the whole loaf? Logic dictates a negative answer. There is persuasive evidence that the American shipping industry is in decline, that increasingly American flag ships are being transferred for operation

under foreign flags. It is said that NMU insistence upon the high work standards established for seamen under its contract are responsible for this loss of jobs to Americans, and should therefore be stopped. Curiously, the SIU also offered to prove its own contract wages and indirect economic benefits compare favorably with those of the NMU. But this is a policy question for authorities other than the Board to consider, at least in a case as clear as this one on the law as it is written.

A final suggestion in the Vantage brief, in which the SIU concurs, is that "the institutional apprehensions or aspirations of labor organizations" are not served by employees seeking to protect their jobs in this fashion against encroachment by other workmen in the same industry. It is for this same reason that the Board in *Moore-McCormack* spoke of the "advantages" to be found in "single unit," and "the elimination of interunion rivalry" and "diminution of conflicts" that might follow broader groupings of seamen. The salutary objective of staying the decline of the entire industry would also be furthered by an end to duplication of both unions and hiring halls in the concerted activities of seamen altogether. After all, collective bargaining as conceived by the Statute envisages not union vis-a-vis union, and not employees vis-a-vis employees, but union and employees vis-a-vis management.

Recommended Order

On the basis of the record in its entirety I hereby recommend that the complaint be, and it hereby is dismissed.

September 2, 1971.

/s/ Thomas A. Ricci
Trial Examiner

Order Correcting Decision and Order

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 2-CE-44

—o—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO;

COMMERCE TANKERS CORPORATION

and

VANTAGE STEAMSHIP CORPORATION

—o—

New York, N. Y.

On May 16, 1972, the National Labor Relations Board issued a Decision and Order [1] in the above-entitled proceeding in which an inadvertent error appears.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by modifying footnote 5 to read as follows:

> 5. This award was confirmed on March 2, 1971, and a preliminary injunction restraining Commerce from selling the vessel was issued. *National Maritime Union of America* v. *Commerce Tankers Corporation,* 325 F.Supp. 360 (D.C.N.Y., 1971). On appeal the injunction was vacated. See *National*

[1] 196 NLRB No. 166. (Volume number appears as corrected on May 18, 1972.)

Order Correcting Decision and Order

Maritime Union of America v. *Commerce Tankers Corporation*, F.2d (C.A. 2, March 22, 1972).

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., May 22, 1972.

By direction of the Board:

ROBERT VOLGER
Associate Executive Secretary

Order Correcting Decision and Order

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 2-CE-44

New York, N. Y.

———o———

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO;
COMMERCE TANKERS CORPORATION

and

VANTAGE STEAMSHIP CORPORATION

———o———

[Dated August 31, 1972]

On May 16, 1972 the National Labor Relations Board issued a Decision and Order [1] in the above-entitled proceeding in which the Board found that the Respondent violated Section 8(e) of the National Labor Relations Act, as amended.

Thereafter, on June 2, the Respondent National Maritime Union of America, AFL-CIO (hereinafter called NMU) filed a Motion for Reconsideration, Rehearing, or Reopening of the Record. It alleges, *inter alia*, that the Board's Decision and Order contains material errors of fact relating to the hiring and permanent status of NMU's seamen when a ship operates out of different ports of referral. Specifically, it contends in pertinent part that the Board erroneously found that an employee retains a permanent job aboard a ship only "for as long as that

[1] 196 NLRB No. 166.

ship operates out of the port of referral" and loses permanent employment whenever that vessel is ". . . sold, operated out of another port, or placed in layup status . . . " NMU requests that the Board should either correct these errors or if the factual errors are deemed relevant to the merits of the case, to reopen the record for the taking of additional evidence.

The Charging Party, Vantage Steamship Corporation, the General Counsel, and the Intervenor, Seafarers International Union of North America, filed briefs in opposition to Respondent's motion and Respondent filed a reply brief.

The Board having duly considered the issues raised by Respondent's motion,[2] finds that certain of its factual findings, namely that an employee retains permanent crew status only so long as his ship operates out of the port of referral or until it is placed in layup status, are in error and warrant correction. Thus, the Respondent's motion is granted to that extent only. In so doing, we reaffirm our original decision in all other respects, and emphasize that we do not consider these factual errors to be material errors or errors as to material facts. Moreover, these corrections do not warrant any change in our original decision, the holding of which was predicated on our find-

[2] We deny that part of NMU's motion which alleges that the Board improperly took administrative notice of certain statistics compiled by the U.S. Department of Commerce, Maritime Administration, and its request that the record be reopened to allow it to offer rebuttal evidence thereto, as lacking in merit. Moreover, we note that although Respondent apparently contends that these sales of vessels were for the purpose of scrapping and not for the purpose of continued operation it acknowledges in its motion that "vessels were sold to an operator who would operate the vessels for one or two voyages" and that "undoubtedly there were some sales during this period of vessels which did have a substantial economic life." Thus, Respondent by its own admissions has conceded, in part, the validity of the statistics of which the Board has taken administrative notice.

ing that upon the sale of a ship, the permanent employees manning her lose their jobs and a new crew is referred through the Union's hiring hall system. However, we have granted the motion to the extent indicated above so that there will be no uncertainty as to the basis for our original finding of a violation and of the facts supporting that finding. Thus, in order to clarify our decision we have hereinafter deleted any and all reference to those facts which are not supported by the record.

Accordingly, the Board's Decision and Order is corrected in the manner set forth in the order herein.

ORDER

IT IS HEREBY ORDERED that the Decision and Order of May 16, 1972, numbered 196 NLRB No. 166, be and it hereby is, corrected by:

Substituting the following for page 6 of the slip opinion of the Decision and Order:

"Thus, because of the unique nature of this industry, virtually all hiring is accomplished through hiring halls located in various ports. An employee is referred to a ship on a permanent basis and retains that position for as long as the Company and the employee desire to continue such employment relationship. However, when a ship is sold, the employees lose their jobs and a new crew is referred through the NMU's hiring hall system.[3] As a practical matter therefore, in the light of this practice, although each ship has a permanent stable work force of employees assigned to it through the hiring hall, whom the Union clearly has a lawful interest in protecting against job loss, the clauses in question in fact *do not* protect those em-

[3] When the vessel *Thalia* was sold by Commerce to an NMU signatory, for example, the Commerce crew left the ship and a new crew was referred from the hiring hall in the new port.

ployees at all in the event of a sale, but instead, as here, serve to preserve those *jobs* for those other seamen who may be eligible for referral through the NMU hiring hall at the port out of which the new owner is to operate. In these circumstances, these clauses place restrictions on sales which are not strictly "germane to the economic integrity of the principal work unit . . ."[4] Instead they only insure that the purchasing employer is under contract with the NMU. Consequently, to conclude that these clauses are lawful would obliterate the distinction between unit" (end of corrected page 6 of slip opinion).

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., August 31, 1972.

By direction of the Board:

/s/ GEORGE A. LEET
Associate Executive Secretary

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[4] *Orange Belt District Council of Painters No. 48* [*Calhoun Drywall Co.*] v. *N. L. R. B.*, 328 F.2d 534, 538 (C. A. D. C.).